

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Respondent,

No. CR S-96-0190 DFL GGH P

vs.

JAMES ROY BARRON,

ORDER

Movant.

_____/

The following matters came on for hearing before the undersigned on January 19, 2006: 1) movant's November 21, 2005 motion to expand the record; 2) movant's November 22, 2005 motion for reconsideration of the undersigned's finding of procedural default as to Claim 6; 3) respondent's January 10, 2006 motion for reconsideration of evidentiary hearing and motion for summary adjudication of Claims 1 and 2; 4) movant's January 13, 2006 request to strike government's late-filed motion. Suzanne Luban appeared for movant. Samantha Spangler represented the respondent.

Motion to Reconsider the Hearing

Respondent brought a reconsideration motion at the eleventh hour, asking that this court re-visit its December 1, 2004 Order and Findings and Recommendations, and summarily adjudicate Claims I and 2, a motion understandably strongly opposed by movant. As the court

1 observed at the hearing on the motion, the motion itself was belatedly filed, as well, the request
2 for reconsideration was beyond a year from the order (and findings and recommendations)
3 challenged. Respondent argued, inter alia, that two other counsel proceeded her appearance in
4 this matter, in effect, segmenting the case into three discrete parts, not amenable to having been
5 addressed in the way issues would have been met had there been one counsel throughout. She
6 also attempted to raised issues challenging the subsequent factual development rendered by
7 movant's counsel as opposed to addressing the legal basis for her motion.

8 The undersigned informed respondent that, at some point, dilatoriness in bringing
9 forward points and issues no matter how arguably meritorious, and even if such tardiness cannot
10 be fairly wholly attributable to current counsel for respondent, cannot be countenanced. On the
11 other hand, the court agreed that respondent's brief in support of the belated motion need not be
12 stricken and could be relied on by respondent at the evidentiary hearing in the form of a hearing
13 brief, a point with which movant did not take issue. Movant's counsel requested that she be
14 permitted to file movant's brief post-evidentiary hearing, after obtaining a hearing transcript;
15 respondent sought leave to file a reply to that brief, for all of which the court granted leave.

16 Movant's Motion to Reconsider Procedural Default as to Claim 6

17 As to the motion to reconsider the procedural bar on Claim 6, this court observed
18 at the motion hearing, that this challenge, the direct claim of constitutional error arising from
19 movant being denied the right to testify, is a trial court error with case law clearly supporting the
20 proposition that the trial court has no duty, without a demonstrable exhibition by movant at trial
21 to put the court on notice, to advise a defendant of his right to testify. See Order and Findings
22 and Recommendations, filed on December 1, 2004, p. 5; United States v. Pino-Noriega, 189 F.3d
23 1089, 1094-1095 (9th Cir. 1999) ("district court has no duty to affirmatively inform defendants
24 of their right to testify, or to inquire whether they wish to exercise that right"), citing United
25 States v. Edwards, 897 F.2d 445, 447 (9th Cir. 1990); United States v. Martinez, 883 F.2d 750,
26 760 F.2d 1470 (9th Cir. 1989) vacated on other grounds, 928 F.2d 1470 (9th Cir. 1991).

1 Movant's counsel could not and did not dispute this point but questioned whether
2 movant's waiver could be considered voluntary and knowing in the circumstances. By way of
3 example, the undersigned pointed to the case of Colorado v. Connelly, 479 U.S. 157, 167, 107 S.
4 Ct. 515, 522 (1986) (defendant's mental acuity not pertinent if police conduct was not coercive)
5 (voluntary confession context). See also, Derrick v. Peterson, 924 F.2d 813, 818 (9th Cir. 1990).
6 This court finds, as many have before, that it is unworkable to impose the burden movant would
7 seek to impose on the trial court. Despite the defendant's competence to proceed, movant would
8 have the trial court assess each defendant's ability to thoroughly understand his right to testify,
9 and determine for each defendant the amount of advice regarding the right to testify that was
10 necessary dependent on such characteristics as general intelligence, street smarts, educational
11 level, mental acuity, mood and so forth. On the evidence of the trial record, the finding that
12 movant waived such a claim and that it is procedurally defaulted is warranted. There was no
13 basis to reach the prejudice analysis.

14 Motion to Expand the Record

15 At oral argument, movant's counsel suggested that the parties could stipulate prior
16 to the hearing as to specific documents, obtaining the requisite authentication. Respondent's
17 counsel agreed that a ruling on the motion need not be rendered pre-evidentiary hearing but
18 asserted that she would not stipulate to any expansion of the record that did not have an adequate
19 foundation. The undersigned made observations with respect to the liberality of the statute
20 regarding expansion of the record, Rule 7 of the Rules Governing Section 2254 Cases, a
21 liberality that exceeds the parameters set by the Federal Rules of Evidence. Movant's counsel
22 sought to be able to submit by way of affidavit explanations with regard to movant's school
23 record documentation, records which respondent characterized as "cryptic." The court made
24 clear that while expansion of the record might well be liberally allowed at the evidentiary
25 hearing, nevertheless, respondent would be free to posit objections which would be likely to
26 affect the weight which the undersigned would accord the expansion. The court also cautioned

1 that only declarations of a solely ministerial nature could be submitted; otherwise, the witness
2 would have to be available to undergo cross-examination. The parties were to meet to discern to
3 what extent any expansion of the record might be effected by way of stipulation.

4 Initially, respondent's counsel did not anticipate offering any exhibits beyond
5 what is in the record or any expert testimony. The court informed the parties that either could
6 call any other party's witness. To the extent that respondent modified her initial assertion, the
7 court ordered that respondent must file and serve any extra-record witness list and exhibit list
8 upon movant by one week from January 19, 2006.¹

9 Movant sought to amend the witness list to name an unidentified individual who
10 might be able to interpret the meaning of notations in movant's school record.

11 Movant has the burden and will begin.

12 After hearing, the court makes the following ORDERS:

13 1. Respondent's January 10, 2006 motion for reconsideration of evidentiary
14 hearing is denied as untimely;

15 2. Movant's January 13, 2006 request to strike respondent's late-filed motion is
16 denied as unnecessary; the motion itself having been denied, respondent is granted leave to
17 submit the briefing in support of the late-filed motion for reconsideration as respondent's
18 evidentiary hearing brief;

19 3. Movant's November 22, 2005 motion to reconsider the finding of procedural
20 default as to Claim 6 is denied;

21 4. Movant's November 21, 2005 motion to expand the record is deferred pending
22 further discussion at the evidentiary hearing;

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25 ¹ Movant's January 31, 2006 motion in limine demonstrates that respondent's counsel
26 apparently did serve, by January 26, 2006, respondent's witness and exhibit list, although she
failed to file those lists.

5. Respondent's witness and exhibit list was to be filed and served upon movant by no later than one week from the date of the January 19, 2006 hearing; and

6. The evidentiary hearing remains set for February 27, 2006 at 9:00 a.m. before the undersigned.

DATED: 2/22/06

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

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